FILED
FEB 4 - 2004
OFFICE OF THE CLERK

No. 03-952

IN THE

Supreme Court of the United States

BEVERLY M. BRAZAUSKAS,

Petitioner,

v.

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., SACRED HEART PARISH and JOSE MARTELLI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF IN OPPOSITION

WILLIAM T. HOPKINS, JR.
Counsel of Record
KAREN A. FESTA
BARNES & THORNBURG
600 One Summit Square
Fort Wayne, Indiana 46802
(260) 423-9440

Attorneys for Respondents

185571

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Does the "church autonomy doctrine" defeat a claim under Indiana's former blacklisting statute against a church and its clergy, where the ex-employee's only evidence of alleged blacklisting were communications between clergy made pursuant to their obligations under a religious directive issued by the highest church authority, and where there is no evidence that those communications concerned her re-employment?

2. Under *Employment Div. v. Smith*, can an ex-employee impose liability under Indiana's former blacklisting statute on a church and its clergy for communications made to other church officials, where such communicative activity occurred pursuant to a religious directive that concerned matters of internal church governance?

LIST OF PARTIES

All of the parties to this proceeding are correctly listed in the Petition for a Writ of Certiorari, except that the correct name of the Respondent identified as "Fort Wayne-South Bend Diocese, Inc." is "Diocese of Fort Wayne-South Bend, Inc."

RULE 26.9 NOTATION

The Respondent, Diocese of Fort Wayne-South Bend, Inc., has no parent, and there are no publicly held companies that hold any stock of the Respondent.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Rule 26.9 Notation	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	2
1. Introduction	2
2. Facts	2
3. Procedural History	6
Reasons for Denying the Petition	9
1. No national or public interest will be served by review of this case because it involves the vindication of a state-created right under the former version of a state statute.	9

Contents

Page

2. The Indiana Supreme Court did not deviate from established precedent regarding church autonomy, and did not render a significant church autonomy decision, warranting review. 14

3. This case does not present compelling grounds for this Court to reexamine the hybrid exception because the Indiana Supreme Court's decision focused on church autonomy. 19

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Bartlett v. Stephenson, 535 U.S. 1301 (2002) 11, 12

Bridgestone/Firestone, Inc. v. Lockhart, 5 F. Supp. 2d 667 (S.D. Ind. 1997) 13

Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996) 22

Bryce v. Episcopal Church, 289 F.3d 648 (10th Cir. 2002) 15, 16

Butts v. OCE-USA, Inc., 9 F. Supp. 2d 1007 (S.D. Ind. 1998) 13

Cantwell v. Connecticut, 310 U.S. 296 (1940) 17, 20

Combs v. Central Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999) 15

EEOC v. Catholic University of Amer., 83 F.3d 455 (D.C. Cir. 1996) 15, 22, 23

EEOC v. Roman Catholic Diocese, 213 F.3d 795 (4th Cir. 2000) 15

Employment Division v. Smith, 494 U.S. 872 (1990) ..... *passim*

Cited Authorities

	Page
Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000)	15
Gonzales v. Roman Catholic Archbishop, 280 U.S. 1 (1929)	14
Hull v. Central Trans., Inc., 628 F. Supp. 784 (N.D. Ind. 1986)	13
Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952)	14
Kissinger v. Board of Trustees of Ohio St. University, 5 F.3d 177 (6th Cir. 1993)	22
Knight v. State of Conn., 275 F.3d 156 (2d Cir. 2001)	21
Kreshik v. St. Nicholas Cathedral of Russian Orthodox Church, 363 U.S. 190 (1960)	14
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)	11
Lucas v. Townsend, 486 U.S. 1301 (1988)	11-12
Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367 (1970)	15
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	20

Page

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 10, 11

Ross v. Moffitt, 417 U.S. 600 (1974) 13

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 14

Swanson v. Guthrie Independent Sch. District, 135 F.3d 694 (10th Cir. 1998) 21

Thomas v. Anchorage Equal Rights Com'n, 165 F.3d 692, *withdrawn, reh'g granted*, 192 F.3d 1208 (9th Cir. 1999), *vacated en banc*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001) 21

Ticor Title Insurance Co. v. Brown, 511 U.S. 117 (1994) 11

Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) ... 14

STATE CASES

Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc., 755 N.E.2d 201 (Ind. Ct. App. 2001) 6

Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc. ("Brazauskas"), 796 N.E.2d 286 (Ind. 2003) .. *passim*

Cited Authorities

Page

Burk v. Heritage Food Serv. Equipment, Inc., 737 N.E.2d 803 (Ind. Ct. App. 2000) 13

McKelvey v. Pierce, 800 A.2d 840 (N.J. 2002) 17

Wabash Railroad Co. v. Young, 162 Ind. 102, 69 N.E.2d 1003 (Ind. 1904) 13

DOCKETED CASES

Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc., No. 71D07-9302-CP-10017 (St. Joseph Super. Ct. Feb. 7, 2001) 6

UNITED STATES CONSTITUTION

U.S. Const. amend. I 6, 9, 22

STATE STATUTES

Ind. Code § 22-5-3-1 (1993) 4

Ind. Code § 22-5-3-2 (1993) 4

Ind. Code Ann. § 22-5-3-1(b) (West 2003) 1, 9

Page

RULE

Sup. Ct. R. 10 ..... 13, 20

MISCELLANEOUS

Am. Jur. 2d *Labor & Labor Relations* § 669 (2003) 12

Ex Corde Ecclesiae ..... *passim*

Validity, Construction, and Operation of State Blacklisting Statutes, 95 A.L.R.5th 1 (2004) ... 12

Respondents, the Diocese of Fort Wayne-South Bend, Inc., Sacred Heart Parish, and Jose Martelli, respectfully request that this Court deny the Petition for a Writ of Certiorari, seeking review of the Supreme Court of Indiana's opinion in this case.

STATEMENT OF JURISDICTION

Petitioner's statement regarding jurisdiction is correct except that the Indiana Supreme Court's opinion did not "affirm[] dismissal of Petitioner's claim." Rather, the Indiana Supreme Court reversed the dismissal of the case for lack of subject matter jurisdiction and remanded it to the trial court for entry of summary judgment in the Respondents' favor.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents include the following 1995 revision to the Indiana blacklisting statute in addition to the constitutional and statutory provisions cited by Petitioner:

> An employer that discloses information about a current or former employee is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made.

IND. CODE ANN. § 22-5-3-1(b) (West 2003).

STATEMENT OF THE CASE

1. Introduction

The issue in this case arises under a version of the Indiana blacklisting statute in effect prior to 1995. Petitioner Beverly Brazauskas ("Brazauskas") seeks reinstatement of her blacklisting claim against the Respondents Diocese of Fort Wayne-South Bend, Inc. ("Diocese"), Sacred Heart Parish ("Sacred Heart"), and Father Jose Martelli ("Fr. Martelli"). Brazauskas has petitioned this Court for a writ of *certiorari* to the Indiana Supreme Court, which ordered the case remanded for entry of summary judgment in favor of the Diocese, Sacred Heart, and Fr. Martelli.

2. Facts

Sacred Heart, which is part of the Diocese, is located on the campus of the University of Notre Dame ("Notre Dame") near South Bend, Indiana. In 1992, Brazauskas was employed by Sacred Heart as the Director of Religious Education and Liturgy. In August 1992, Fr. Martelli, who was the Parish Pastor and Brazauskas' supervisor, dismissed her from her position because he had serious concerns about how she performed her pastoral duties.

In October, 1992, the Assistant Chair of the Notre Dame Theology Department and a supporter of Brazauskas, Dr. Kern Trembath ("Trembath"), sent a letter to Fr. Martelli regarding Brazauskas' termination. In the letter, Trembath accused Fr. Martelli of scandalizing the Catholic Church by firing its employees. He indicated that "the fact that you are allowed to remain a priest is simply and strictly a measure of the worldwide shortage of priests." (Appendix to Petition

for a Writ of Certiorari, page 8 ("Pet. App. 8")). He described Fr. Martelli as "a bad priest, and . . . not a cultural American." (*Id.*) Trembath's letter was followed by a second letter in October 1992 from Trembath and his wife accusing Fr. Martelli of lying, and threatening litigation unless, among other things, he resolved Brazauskas' issues against him to the satisfaction of Brazauskas and her attorney. (*Id.*).

In November 1992, Fr. Martelli wrote to Notre Dame's President, Father Edward Malloy ("Fr. Malloy"). He enclosed copies of the Trembaths' letters, indicating that they "include charges and accusations so alarming in nature that I would be remiss not to bring them to your attention." (Pet. App. 8). Fr. Martelli mentioned Brazauskas only as the reason for the Trembaths' letters. He did not criticize her or her actions. (*Id.*). Fr. Martelli indicated that "I send these documents to you for your information and not with the intent of causing more trouble for anyone." (*Id.*).

In February 1993, Brazauskas sued the Diocese, Sacred Heart and Fr. Martelli (collectively, "Diocese defendants") over her termination alleging a variety of state law claims. All of her claims were eventually dismissed in various state court proceedings. While her lawsuit was pending, Brazauskas applied for a position at Notre Dame as the Acting Director of the Program for Church Leaders ("PCL"), a sabbatical program for persons in the religious ministry. In June 1993, a Notre Dame search committee recommended Brazauskas for the PCL job to Fr. Malloy.

Fr. Malloy indicated that he was unaware that the PCL program was still in existence and that he thought the program had been dissolved. (Pet. App. 3 n.1, 20). He also testified that it was his belief that Notre Dame "should not hire

someone who is in an active lawsuit against the local bishop until that matter [is] resolved." (Pet. App. 2). He stated that "I consider a [C]atholic university to desirably have a positive and respectful relationship to the [C]atholic church community, including the local bishop," and hiring someone bringing a pending lawsuit "would be a gesture of ill will until such a matter was resolved by the courts." (Pet. App. 2-3). The PCL program was subsequently eliminated. (Pet. App. 3 n.1, 20).

After Brazauskas learned that she had not received the Notre Dame PCL job in the summer of 1993, she added claims to her lawsuit against the Diocese defendants for blacklisting, pursuant to a pre-1995 version of Indiana's blacklisting statute, and for tortious interference with a business relationship.[1]

The Indiana blacklisting statute prohibited a "person" from "preventing" a former employee from obtaining employment with "any other person" or attempting to do so. IND. CODE §§ 22-5-3-1, 22-5-3-2 (1993); (Petition for a Writ of Certiorari, page 3 ("Pet. 3")). Brazauskas claimed that the Diocese defendants made communications to Notre Dame that unlawfully prevented her from getting the PCL job. Brazauskas produced no evidence that Diocese and Notre

1. Brazauskas added her tortious interference claim in August 1993, and blacklisting in September 1995. (Pet. App. 21). The Indiana Supreme Court held that the former was more accurately "tortious interference with prospective advantage," an element of which was "independent illegal action." *Brazauskas*, 796 N.E.2d at 289 n.2, 291 (citation omitted) (Pet. App. 3 n.2, 7). Since blacklisting was the only illegal action Brazauskas alleged, her ability to assert a tortious interference claim would depend on her ability to sustain a blacklisting claim. *Id.* at 291 (citation omitted) (Pet. App. 7).

Dame officials communicated about the PCL position or her candidacy for it. (Pet. App. 9). Instead, Brazauskas claimed that blacklisting could be inferred from Fr. Martelli's correspondence to Fr. Malloy enclosing the Trembaths' letters, phone records showing calls from the office of the Bishop of the Diocese, John M. D'Arcy ("Bishop D'Arcy") to Notre Dame officials during the weeks of Brazauskas' candidacy for the PCL job, and Notre Dame's cancellation of the PCL program. (Pet. App. 8-9, 26-27).

The relationship and communications between a Catholic Diocese and a Catholic university located within that Diocese are governed by a religious directive that Pope John Paul II issued in 1991. That directive, entitled *Ex Corde Ecclesiae*,[2] is based on Catholic Church Canon Law. *Ex Corde Ecclesiae* calls for "close personal and pastoral relationships . . . between universities and Church authorities characterized by mutual trust, close and consistent cooperation and continuing dialogue." *Ex Corde Ecclesiae* at 20 (Pet. App. 3, 27-28). *Ex Corde Ecclesiae* requires that Catholic universities "be in close communion with the local Church . . . and in particular" with the local Bishop. *Id.* at 33-34 (Pet. App. 28). It also requires that the local Bishop "promote the welfare of the Catholic universities in his diocese" and "watch over the preservation and strengthening of their Catholic character." *Id.* (Pet. App. 28). *Ex Corde Ecclesiae* requires a Catholic university to appoint persons "to provide pastoral ministry for the university community, carried on in harmony and cooperation with the pastoral activities of the local Church *under the guidance or with the approval of the diocesan bishop*." *Id.* at 34-35 (emphasis added) (Pet. App. 28).

---

2. POPE JOHN PAUL II, APOSTOLIC CONSTITUTION EX CORDE ECCLESIAE OF THE SUPREME PONTIFF (St. Paul Books & Media 1991).

3. Procedural History

In the Indiana courts, the Diocese defendants argued that the conduct which formed the basis of Brazauskas' blacklisting claim occurred pursuant to Fr. Martelli's and Bishop D'Arcy's obligations under, and efforts to comply with, religious law, *i.e.*, *Ex Corde Ecclesiae.* Therefore, the First Amendment to the United States Constitution precluded secular court review of that conduct under Indiana's blacklisting law. U.S. CONST. amend. I. The trial court granted the Diocese defendants' motion to dismiss for lack of subject matter jurisdiction. *Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc.*, No. 71D07-9302-CP-10017 (St. Joseph Super. Ct. Feb. 7, 2001) (Pet. App. 32). The Indiana Court of Appeals affirmed the trial court, concluding that because the Diocese defendants' actions had a doctrinal basis, a secular court could not review those actions. *Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc.*, 755 N.E.2d 201, 208 (Ind. Ct. App. 2001) (Pet. App. 19, 31).

Brazauskas appealed to the Indiana Supreme Court. That court reversed the dismissal of the case for lack of subject matter jurisdiction, concluding that secular courts could review religious directives for limited purposes; however, the court ultimately found in favor of the Diocese defendants. *Brazauskas v. Ft. Wayne-S. Bend Diocese, Inc.* (*"Brazauskas"*), 796 N.E.2d 286, 292-93 (Ind. 2003) (citation omitted) (Pet. App. 1, 10-11). It remanded the case for entry of summary judgment in their favor. *Brazauskas*, 796 N.E.2d at 294 (Pet. App. 14).

In rendering its decision, the Indiana Supreme Court applied and interpreted the version of the Indiana blacklisting statute in effect when Brazauskas' claim arose in 1993.

Id. at 290-91 (Pet. App. 6-7). The court found that Brazauskas based "her claim primarily on a letter Father Martelli wrote more than six months before she applied for the PCL job, and on influence allegedly exerted by the Bishop that prompted Father Malloy to deny Brazauskas the position." *Id.* at 291 (Pet. App. 8). As to Fr. Martelli's letter, the Court found Brazauskas failed to explain "how such a letter could support a reasonable inference that by making others aware of Trembath's accusations Father Martelli prevented her from getting the PCL position." *Id.* at 292 (Pet. App. 9). The court found that Brazauskas' allegations against the Bishop were "on similarly shaky factual ground[,]" observing that "[b]oth Bishop D'Arcy and Father Malloy deny that they ever discussed the PCL position, much less Brazauskas' candidacy." *Id.* (Pet. App. 9). The court found that Brazauskas' evidence, such as records of phone calls from the Bishop to Notre Dame officials was "at most marginally sufficient to raise a genuine issue of material fact. . . ." *Id.* (Pet. App. 9).

The Indiana Supreme Court found that besides the weakness of Brazauskas' evidence, religious motivation behind Bishop D'Arcy's and Fr. Martelli's actions precluded statutory blacklisting liability under the facts of the case. It found that *Ex Corde Ecclesiae* established

> that higher church authority (namely, the Pope) has directed Catholic universities such as Notre Dame and local Catholic diocese officials to cooperate closely, communicate, and develop an environment of mutual trust. Bishop D'Arcy and other diocesan personnel would therefore be acting in accordance with ecclesiastical directive in keeping Father Malloy apprised of diocesan

> developments, including pending lawsuits, and in coordinating with him on administrative and policy matters.

Id. at 293 (Pet. App. 11). The court concluded that under the facts of the case, the Free Exercise Clause entitled the Diocese defendants to Summary Judgment on Brazauskas' blacklisting and tortious interference claims:

> Brazauskas would have us apply the blacklisting statute and tort law to penalize communication and coordination among church officials (all answerable to higher church authority that has directed them to work cooperatively) on a matter of internal church policy and administration *that did not culminate in any illegal act.* Such a holding would violate the church autonomy doctrine and run counter to the Court's declaration in *Cantwell v. Connecticut*, 310 U.S. 296, 307 . . . (1940): "the fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged."

Id. at 294 (footnote omitted) (emphasis added) (Pet. App. 13).

REASONS FOR DENYING THE PETITION

1. No national or public interest will be served by review of this case because it involves the vindication of a state-created right under the former version of a state statute.

Brazauskas' claim against the Diocese defendants relies solely on state law. She has not asserted any violation of her federal constitutional rights, only her right not to be "blacklisted" under the Indiana blacklisting statute. The manner in which a federal constitutional issue is implicated is in the defense of Brazauskas' claim—the Indiana Supreme Court interpreted Indiana's blacklisting statute to preclude her claim because of First Amendment restrictions.

Additionally, Brazauskas asserted her claim under a former version of the Indiana blacklisting statute. As the Indiana Supreme Court observed, Indiana's blacklisting statute in 1993 read almost the same as it did at its initial enactment in 1889. *Brazauskas*, 796 N.E.2d at 290 (Pet. App. 6). In 1995, the Indiana legislature added the following exception:

> An employer that discloses information about a current or former employee is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made.

Id. at 291 (quoting IND. CODE ANN. § 22-5-3-1(b) (West 2002)) (Pet. App. 7). The Indiana Supreme Court found: "Brazauskas

does not claim that any of the alleged disclosures that led to her denial of the PCL position were false. She would therefore have no claim for blacklisting under the revised statute" and there would be "no need to reach the Diocese defendants' constitutional argument." *Brazauskas*, 796 N.E.2d at 291 (citations omitted) (Pet. App. 7).

This Court has dismissed a writ of *certiorari* when the issue the case presented was not important to the public or likely to recur. In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), this Court initially granted *certiorari* to consider the petitioner's claim that a cemetery violated her constitutional rights by refusing to bury her husband pursuant to a contract which prohibited burial of non-Caucasians. After granting certiorari, this Court learned that the State of Iowa had passed a subsequent statute that voided such contracts. This court held:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

Rice, 349 U.S. at 74 (citations omitted). Citing former Supreme Court Rule 19, this Court held: "'Special and important reasons' imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the court's duty to avoid a decision of constitutional issues unless avoidance becomes evasion." *Id.* (citation omitted). This Court found that had the

subsequent Iowa statute been properly brought to its attention, the case would have assumed "an isolated significance[,]" and concluded that "in the absence of compelling reason" the Court should not dispose of a case "when time may further illumine or completely outmode the issues in dispute." *Id.* at 77. Quoting its decision in *Layne & Bowler Corp. v. Western Well Works, Inc.*, this Court held:

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Rice, 349 U.S. at 79 (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

Similarly, in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994), this Court observed that "our resolution of the posited constitutional question may be quite unnecessary in law, and of virtually no practical consequence in fact, except with respect to these particular litigants[,]" and that "[e]ven if the constitutional question presented is hypothetical as to everyone else, it would seem to be a great practical importance to these litigants. But that is ordinarily not sufficient reason for our granting *certiorari* . . . ." *Ticor*, 511 U.S. at 121-22. In *Bartlett v. Stephenson*, 535 U.S. 1301 (2002), this Court observed that no reasonable probability existed that four Members of the Court would vote to grant *certiorari* "to resolve what is largely a dispute about the meaning of a single DOJ letter from 1981." *Bartlett*, 535 U.S. at 1304 (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304

(1988) (Kennedy, J., in chambers)). The Court concluded that the issue "which has few if any ramifications beyond the instant case, does not satisfy any of the criteria for the exercise of this court's discretionary jurisdiction. See this Court's Rule 10." *Bartlett*, 535 U.S. at 1304.

Review of the issues Brazauskas raises will have few, if any, ramifications beyond this case in light of the 1995 amendment. This case does not involve a declaration that a law of broad application is unconstitutional under the First Amendment, or vindication of religious institutions' free exercise rights in a far-reaching manner. Rather, this is a state law employment case, brought under the pre-1995 Indiana blacklisting statute, the interpretation of which was the proper province of the Indiana Supreme Court. To the extent the Free Exercise Clause was invoked, the Indiana Supreme Court relied on it to curtail the statute's applicability to the Diocese defendants under the particular facts. The pre-1995 Indiana blacklisting statute did not have a broad application. It was unique to Indiana.[3] Furthermore, that version of the statute is no longer in effect. As the Indiana Supreme Court noted, Brazauskas would have no claim under the 1995 amendment, and it would be unnecessary to address the Diocese defendants' constitutional argument. Therefore, the issues raised by this case are unlikely to recur.[4]

---

3. Twenty-five states have laws dealing with "blacklisting" and those vary greatly from state to state. *See* 48 AM. JUR. 2D *Labor & Labor Relations* § 669 (2003), *see also* Edward M. Cramp, Annotation, *Validity, Construction, and Operation of State Blacklisting Statutes*, 95 A.L.R. 5th 1 (2004).

4. No other cases appear to address Indiana blacklisting claims against religious organizations. The statute in general is not frequently

(Cont'd)

Finally, the Indiana Supreme Court did not engage in an expansive application of the Free Exercise Clause to the blacklisting statute. It specifically limited its holding to the facts of Brazauskas' case. *Brazauskas* 796 N.E.2d at 293-94 (Pet. App. 13-14). Review of this case will therefore result in this Court reexamining those facts and the former Indiana blacklisting statute—issues which will have little effect beyond this case and which will not constitute a constructive use of this Court's time and resources. The issues this case raises, while important to the particular litigants, are not of public importance warranting this Court's review.

Even assuming *arguendo* that the Indiana Supreme Court's reasoning was wrong, reversal of it will only correct a state court's mistaken application of established constitutional doctrines to a former state law. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. This Court has indicated that it is not a tribunal of errors that sits to correct every error of a lower court: "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review," *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

(Cont'd)

litigated. In considering a claim in 2000, the Indiana Court of Appeals observed that no Indiana state court had "addressed any claim under the Blacklisting statute since our supreme court in 1904." *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803 (Ind. Ct. App. 2000). Only a few Indiana state or federal courts have ruled on the merits of such claims: *See* pre-1995 claims: *Hull v. Central Trans., Inc.*, 628 F. Supp. 784 (N.D. Ind. 1986); *Wabash Railroad Co. v. Young*, 162 Ind. 102, 69 N.E.2d 1003 (Ind. 1904). *See* post-1995 claims: *Butts v. OCE-USA, Inc.*, 9 F. Supp. 2d 1007 (S.D. Ind. 1998); *Bridgestone/Firestone, Inc. v. Lockhart*, 5 F. Supp. 2d 667 (S.D. Ind. 1997).

For the reasons above, this case does not implicate the type of far-reaching constitutional issues that necessitate this Court's review.

2. The Indiana Supreme Court did not deviate from established precedent regarding church autonomy, and did not render a significant church autonomy decision, warranting review.

The Indiana Supreme Court's application of the church autonomy doctrine to Brazauskas' blacklisting claim was not a radical departure from or expansion of that doctrine. Rather, the Indiana Supreme Court's application was consistent with this Court's decisions establishing religious organizations' freedom to manage internal, ecclesiastical matters. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871) (". . . whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them. . . ."); *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical . . . are accepted in litigation before the secular courts as conclusive. . . ."); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (holding that religious organizations have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."); *Kreshik v. St. Nicholas Cathedral of Russian Orthodox Church*, 363 U.S. 190, 191 (1960) (companion case to *Kedroff;* held that neither state legislature, nor state judiciary could interfere in matters of church government, faith, and doctrine); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976)

(civil courts deciding "religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.") (quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

The Indiana Supreme Court's decision was also consistent with the federal circuit courts, which have relied on church autonomy in recent cases. The Tenth Circuit's decision in *Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002) provided a thorough discussion of the church autonomy doctrine. *Bryce* involved a suit by two ministers for sexual harassment against the Episcopal Church after it terminated one of them for having a homosexual relationship with the other. As evidence of the harassment, the ministers relied on communications by Church leaders, to parishioners and each other, regarding homosexuality and the ministers' relationship. Citing this Court's line of decisions, and a variety of circuit court decisions, the *Bryce* court first concluded that the church autonomy doctrine remained viable after the decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). It found that the post-*Smith* circuit court cases relied "on a long line of Supreme Court cases affirming the church autonomy doctrine . . . . These [circuit court] cases' rationale extends beyond the specific ministerial exception to the church autonomy doctrine generally, and we therefore find that the church autonomy doctrine remains viable after *Smith*." *Bryce* 289 F.3d at 656-57 (citing *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 n.* (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 348-50 (5th Cir. 1999); *EEOC v. Catholic Univ. of Amer.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996)).

The *Bryce* court then observed that "the church autonomy doctrine is not without limits," and that churches are still liable for tort or contract violations arising from conduct that has no religious motivation. *Id.* at 657 (citations omitted). Relying on this Court's decision in *Wisconsin v. Yoder*, the Tenth Circuit observed that the "threshold inquiry is whether the alleged misconduct is 'rooted in religious belief.'" *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The court concluded that the allegedly harassing conduct of the church officials was "rooted in religious belief" because it consisted of communications between Church leaders, and Church leaders and parishioners, on a matter of Church governance and doctrine, specifically, Church law concerning marriage and homosexuality. *Bryce*, 289 F.3d at 658. The court held:

> The church autonomy doctrine is rooted in protection of the First Amendment rights of the church to discuss church doctrine and policy freely. The applicability of the doctrine does not focus upon the relationship between the church and [plaintiff]. It focuses instead on the right of the church to engage freely in ecclesiastical discussions with members and non-members.

Id.

The Indiana Supreme Court's application of the church autonomy doctrine to the blacklisting statute was consistent with the precedents of this Court and the circuit courts. The Indiana court correctly recognized that churches have been held free from interference in matters of internal governance under such precedents. Also, consistent with precedent, the Indiana court assessed whether the alleged blacklisting conduct was "rooted in religious belief," by

finding sufficient facts showing that Bishop D'Arcy's and Fr. Martelli's communications and conduct were religiously motivated under *Ex Corde Ecclesiae*, which embodied a matter of internal church governance—the Canon Law controlling the relationship between a Catholic diocese and local Catholic university. The Indiana Supreme Court properly concluded that liability for blacklisting could not be imposed on the Diocese defendants for such religiously motivated conduct, particularly where no direct evidence of unlawful secular conduct was shown. This reasoning is consistent with the above cases describing and applying the church autonomy doctrine. It is also consistent with this Court's decision in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), which overturned a person's conviction for breach of the peace where the only conduct shown was the protected communication of religious views and no unlawful secular conduct—such as threats, abuse, or profanity—was established.

The Indiana Supreme Court's application of the church autonomy doctrine was not overly broad or expansive. The Indiana court did not hold that *Ex Corde Ecclesiae* immunized the Diocese defendants against every legal claim. To the contrary, consistent with the above precedents, it limited its decision to the facts of Brazauskas' case. *Brazauskas*, 796 N.E.2d at 293-94 (Pet. App. 13-14). Quoting the New Jersey Supreme Court, the Indiana Supreme Court held that: "'The First Amendment does not immunize every legal claim against a religious institution and its members. The analysis in each case is fact-sensitive and claim specific, requiring an assessment of every issue raised in terms of doctrinal and administrative intrusion and entanglement.'" *Id.* (quoting *McKelvey v. Pierce*, 800 A.2d 840, 844 (N.J. 2002)) (Pet. App. 13-14). As an example, the court

observed that the Free Exercise Clause would not prevent prosecution for an agreement to commit a felony "even if that other person is another church member or official and the agreement implicates ecclesiastical issues, if the state also proves an overt act in furtherance of that agreement in accordance with Indiana's conspiracy statute." *Brazauskas*, 796 N.E.2d 294 n.6 (citation omitted) (Pet. App. 13 n.6).

The Indiana Supreme Court's decision was consistent with the existence, application, and limitations of the church autonomy doctrine. It was not a radical departure from, or expansion of, what this Court, or other courts, have held. Furthermore, The Indiana Supreme Court's decision was not a significant church autonomy decision that would render this case one of public importance. As discussed above, church autonomy arose as a defense to Brazauskas' state law blacklisting claim, and the Indiana Supreme Court limited the doctrine's application to that claim only, under the particular facts of the case. Therefore, the decision's impact was limited to how church autonomy affected factually-similar blacklisting claims in Indiana, and would have no effect on federal or other state jurisdictions. Furthermore, it would have little or no impact on Indiana blacklisting claims because the version of the statute in question is no longer in effect. This case is simply not a seminal church autonomy decision that warrants this Court's review.

3. This case does not present compelling grounds for this Court to reexamine the hybrid exception because the Indiana Supreme Court's decision focused on church autonomy.

This case is not a significant decision concerning "hybrid situations" discussed in *Employment Div. v. Smith*, 494 U.S. 872 (1990):

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press. . . .
>
> The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.

Smith, 494 U.S. at 881-82 (citations omitted) (footnote omitted). The Indiana Supreme Court did quote from *Smith* in discussing how the facts of Brazauskas' case were distinguishable from the facts in *Smith*; however, its decision ultimately focused on church autonomy.

The Indiana Supreme Court observed: "There is an important and relevant limitation in the *Smith* decision. Justice Scalia specifically noted that the case presented 'a free exercise claim unconnected with any communicative activity.' *Id.* at 882. . . . Here, in contrast, the challenged activity was communicative." *Brazauskas*, 796 N.E.2d at 293

(footnote omitted) (Pet. App. 11). Beyond mentioning this distinguishing factor, the Indiana Supreme Court issued no decision concerning the hybrid exception's existence or application. The remainder of the court's decision discussed the church autonomy doctrine, concluding that "the Free Exercise Clause entitles the defendants to summary judgment. . . ." *Id.* at 293-94 (Pet. App. 12-14). One comment regarding "communicative activity" does not render the Indiana Supreme Court's decision a compelling hybrid case under Supreme Court Rule 10. Review of the court's decision will not substantially impact cases that do directly address the hybrid exception.

To the extent the Indiana Supreme Court relied on *Smith*'s statement concerning "hybrid situations," its decision was correct. The court accurately observed, pursuant to *Smith*, that Brazauskas' case against the Diocese defendants involved communicative activity between Church officials, making it factually different from situations in which individuals sought to engage in illegal conduct as a religious practice. This conclusion comports with the language in *Smith* describing "hybrid situations." While the Indiana court therefore correctly applied *Smith*'s language, it also correctly concluded that church autonomy issues, outside of the *Smith* decision, predominated: "*Smith* is distinguishable in another important respect, because it did not implicate the church autonomy doctrine." *Id.* at 293 (Pet. App. 12). Even the cases that *Smith* cited as examples of hybrid situations involving "communicative activity" did not concern communications relating to the internal governance of a religious organization. *Smith*, 494 U.S. at 881 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940) (communicative activity consisted of religious solicitations by individuals); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (communicative activity consisted of dissemination of religious ideas)).

Because this case involved communications between church officials relating to a matter of internal church governance, the Indiana Supreme Court correctly recognized that it posed issues other than those discussed in *Smith*, leading the court to focus on the church autonomy doctrine rather than the hybrid exception. Therefore, these distinguishing issues render this case inappropriate as a prototype for clarification of the hybrid exception, or for resolving any alleged discrepancy between the circuits' application of the exception. This point is further illustrated by the difference between this case, and the circuit court cases dealing with the hybrid exception that Brazauskas cites in her Petition. Not only is the Indiana Supreme Court's decision not in conflict with those cases, it is simply inapposite to them. They did not involve church officials communicating on matters of internal church governance, faith, or doctrine. Instead, they involved individuals who were asserting free exercise claims and coupling them with other constitutional claims. The courts considered the application of the hybrid exception in light of those other constitutional claims. *See Knight v. State of Conn.*, 275 F.3d 156, 166-67 (2d Cir. 2001) (state agency employees disciplined for evangelizing to agency clients failed to state free speech hybrid claim because different legal test applied to public employees); *Thomas v. Anchorage Equal Rights Com'n*, 165 F.3d 692, *withdrawn*, *reh'g granted*, 192 F.3d 1208 (9th Cir. 1999), *vacated en banc*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001) (rental property owners' Fifth Amendment "takings" claims, protesting ordinance requiring rentals to unmarried couples, constituted "hybrid claims" under "colorable claim" approach; however, opinion was withdrawn, and later *en banc* opinion held case not ripe for review); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998) (rejected claim by home-schooled

student's parents that refusal to let student attend public school part time violated free exercise/right to control child's education; held that a hybrid claim: "at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right. . . ."); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996) (rejected claim by students' parents against school for requiring students' attendance at sexually explicit AIDS awareness program because free exercise not "conjoined with an independently protected constitutional protection."); *Kissinger v. Bd. of Trustees of Ohio St. Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (rejecting the hybrid exception in case brought by veterinary student demanding that she be excused from a required course on several constitutional grounds).

In this case, the Diocese defendants neither asserted a free exercise claim or a companion "hybrid" claim; they raised the First Amendment only as a defense to Brazauskas' state law claims—a defense based on notions of church autonomy. This case therefore involves different issues from the cases Brazauskas cites. It does not relate to those cases and is not an appropriate case for resolving any alleged discrepancies among their interpretations of the hybrid exception.

The only case Brazauskas cites which relates to the Indiana Supreme Court's decision is *EEOC v. Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996), because it involved a religious organization defending itself against a sex discrimination claim. The D.C. Circuit rejected the EEOC's and plaintiff's claim, based primarily on the university's First Amendment defense under the ministerial exception/church autonomy

doctrine. *Catholic Univ*, 83 F.3d at 462-66. The D.C. Circuit held secondarily that, absent ministerial exception grounds, the university would have a defense that the case was a "hybrid situation" described in *Smith* because it involved both free exercise and excessive entanglement issues. *Id.* at 467. This conclusion was consistent with *Smith*'s discussion of what constituted a hybrid situation. The Indiana Supreme Court's decision is not in conflict with *Catholic University's* holding; rather, it is consistent. The court focused on the church autonomy doctrine as the primary issue, but also noticed the presence of "communicative activity" as another distinguishing factor under *Smith*. Because the Indiana Supreme Court's decision properly focused on church autonomy, it is not a seminal hybrid case of public importance that would warrant this Court's reexamining the hybrid exception.

Even assuming *arguendo* that the Indiana Supreme Court's statement regarding "communicative activity" was wrong, reversal will have no effect, because the court relied on the church autonomy doctrine as other grounds for its decision. Even if the Indiana court's decision was reversed in its entirety, its effect would be limited to reinstating Brazauskas' state law blacklisting claim under a former version of Indiana's blacklisting statute. As discussed above, this result will not have far reaching effects, even in Indiana. Therefore, this case does not merit review.

CONCLUSION

For the reasons above, Brazauskas' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM T. HOPKINS, JR.
Counsel of Record
KAREN A. FESTA
BARNES & THORNBURG
600 One Summit Square
Fort Wayne, Indiana 46802
(260) 423-9440

Attorneys for Respondents